Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to require inmates to exhaust "such administrative remedies as are available" before initiating an action under federal law.

1. Does the amendment require prisoners to exhaust internal prison grievance procedures before bringing a claim for damages?

2. Does the amendment require prisoners to exhaust administrative claim procedures before bringing a claim for damages?

LIST OF PARTIES

Petitioners are K. Black and J. Beckett, California correctional officers, T. Meadors, a correctional supervisor, and D. Hill, the warden of the California Correctional Institution. Respondent is Macarthur Rumbles, a prisoner confined at the California Correctional Institution.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 182 F.3d 1064 (9th Cir. 1999). Appendix 1a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 30, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996), which amended 42 U.S.C. § 1997e.

As amended, § 1997e provides in relevant part as follows:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Before it was amended, § 1997e provided in relevant part as follows:

> (a) Applicability of administrative remedies
>
> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required

> unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e (1994).

STATEMENT OF THE CASE

Respondent Macarthur Rumbles is an inmate incarcerated at the California Correctional Institution (CCI). In his complaint, he alleged that correctional officer K. Black referred to him in derogatory terms and spit on him. Appendix 35a-37a. He further alleged that correctional officer J. Beckett made factual misrepresentations during an investigation, and that Black's supervisor, T. Meadors, condoned Black's behavior and was biased in conducting an ensuing disciplinary hearing involving respondent. *Id.* at 38a-39a. Lastly, respondent alleged that the warden of CCI, D. Hill, was responsible for illegal prison policies. *Id.* at 39a. Respondent's request for relief included a demand for an apology and $450,000 in punitive damages. *Id.* at 40a.

The prison officials filed a motion to dismiss in which they argued that respondent had failed to satisfy 42 U.S.C. § 1997e as amended by section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996) (PLRA). In support of their motion, the prison officials presented evidence showing that respondent had failed to take advantage of an internal prison grievance procedure and an administrative process that provides monetary awards for claims against

the State and state employees. The district court treated the motion as one for summary judgment and denied it. *Id.* at 16a.

The prison officials sought and obtained permission to file an interlocutory appeal. After acknowledging that "[a]uthorities are split," the court of appeals concluded that amended § 1997e imposes no duty on state prisoners to exhaust internal grievance procedures before bringing federal damage claims. *Id.* at 10a. Disregarding the language and legislative circumstances of § 1997e, the court simply expressed an unwillingness to retreat from an earlier decision that had rejected a mandatory exhaustion requirement for federal prisoners bringing *Bivens* claims. *Id.* at 11a-12a (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)).

The court of appeals also concluded that the amended statute imposes no requirement on prisoners to exhaust state administrative claim procedures before suing for damages even if money awards could be procured in the administrative process. In support of its ruling, the court remarked, without analysis, that "[i]t does not appear that Congress intended such a change." Appendix 13a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the timely opportunity to resolve the clear and growing split among the circuits regarding the applicability of § 1997e's mandatory exhaustion requirement to prisoners' claims for damages. The Ninth Circuit's decision allowing inmates to bring claims for damages notwithstanding a failure to exhaust administrative remedies ignores the plain language and legislative evolution of § 1997e, and it impedes Congress's goals of reducing prisoner litigation, promoting

efficient case management, and minimizing court intrusion in prison affairs.

I.

THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS WHETHER § 1997e REQUIRES PRISONERS TO EXHAUST INTERNAL GRIEVANCE PROCEDURES BEFORE BRINGING A CLAIM FOR DAMAGES.

This petition should be granted to resolve the clear conflict among the circuits regarding the applicability of amended § 1997e's exhaustion requirement to prisoner suits that include a claim for damages under federal law. The Seventh and the Eleventh Circuits have held that the statute requires inmates to avail themselves of prison grievance procedures, regardless whether these programs confer monetary awards, before initiating an action for damages. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. June 24, 1999); *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998). In direct conflict with those circuits, the Ninth, Fifth, and Tenth Circuits have held that prisoners need not take advantage of internal grievance procedures before bringing a claim for damages if monetary awards could not be obtained in the administrative process. *Rumbles v. Hill*, Appendix 11a-12a; *Whitley v. Hunt*, 158 F.3d 882, 886-87 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997).

Several courts of appeals, including the court below, have expressly commented upon the split, its irreconcilability, and the confusion it has caused in the district courts. *Rumbles v. Hill*, Appendix 10a ("Authorities are split."); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 537 ("[S]everal courts of appeals

have gone the other way."); *Alexander v. Hawk*, 159 F.3d at 1327 ("These [conflicting] decisions do not persuade us to accept [the prisoner's] position."); *Whitley v. Hunt*, 158 F.3d at 886 n.2 ("Among those federal district courts that have addressed the issue, there appears to be substantial disagreement."). The need to resolve the conflict is acute. This petition presents a timely and appropriate vehicle for the Court to provide needed guidance to the circuits and to settle the question.

II.

THE NINTH CIRCUIT'S DECISION IGNORES THE PLAIN LANGUAGE AND LEGISLATIVE EVOLUTION OF § 1997e.

As amended, § 1997e provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (Supp. IV 1998). The text is clear: if administrative procedures exist, an inmate must use them before bringing a federal lawsuit. There is nothing in the language to support the lower court's view that exhaustion is mandatory only when administrative programs dispense monetary awards or grant relief precisely congruent with the prisoner's desires.

If the text of the statute were not plain enough, its legislative evolution irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process. Former § 1997e contained a discretionary exhaustion standard applicable when the administrative process was "plain, speedy, and effective." 42 U.S.C. § 1997e(a)(1) (1994). In amending the statute, Congress pointedly

deleted this requirement and confirmed that it expected exhaustion to be mandatory regardless whether the administrative process effectively dispenses relief to the prisoners' satisfaction. "[W]hen these words left the statute so did any warrant to inquire whether exhaustion would be availing." *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 536. The Eleventh Circuit elaborated on this observation:

> The removal of the qualifiers "plain, speedy, and effective" from the PLRA's mandatory exhaustion requirement indicates that Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is "available" in the prison involved.

Alexander v. Hawk, 159 F.3d at 1326.

The importance of congressional intent in construing statutory exhaustion requirements was stressed by the Court in a case arising out of former § 1997e. In *McCarthy v. Madigan*, the Court examined the earlier version of the statute and concluded that it imposed no requirement on federal inmates to exhaust internal grievance procedures before seeking *Bivens* relief. 503 U.S. 140, 150-51 (1992). In reaching its conclusion, the Court provided straightforward instruction on how statutory exhaustion requirements are to be interpreted: "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *Id.* at 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). "[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion

principles in a manner consistent with congressional intent and any applicable statutory scheme." *McCarthy v. Madigan*, 503 U.S. at 144. "Where Congress specifically mandates, exhaustion is required." *Id.* (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989)).

Four years after *McCarthy* was announced, the PLRA was enacted. Unopposed statements made during congressional floor debates reveal that § 1997e was amended in direct response to the Court's holding in *McCarthy* and reflect a purpose to require prisoners to exhaust all available administrative procedures before initiating federal claims for damages:

> The real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only. *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something. . . . I am very pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the *Bivens* issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to

> administrative remedy process before proceeding to court.

141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo). Because the PLRA was not passed as a committee bill, but rather was attached as a rider to an appropriations bill, "floor debate is more indicative of legislative intent than it otherwise would be, especially where the floor statements in favor of the bill remain uncontested as was the case with Congressman Lobiondo's remarks." *Garrett v. Hawk*, 127 F.3d at 1266 n.2; *see also Patsy v. Board of Regents of Florida*, 457 U.S. at 502-11 (relying heavily on floor debates in interpreting statutory exhaustion requirement).

In this case, the Ninth Circuit failed to examine the plain language and legislative evolution of § 1997e. With regard to the internal grievance procedures, the court simply declared that it was bound by principles of precedent to reject a mandatory exhaustion requirement because a similar conclusion had been reached in a case involving federal prisoners seeking *Bivens* relief. Appendix 11a-12a (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)). But the persuasive and precedential value of the one-paragraph decision in *Lunsford* was exaggerated; the case was decided on a stipulation between the parties, and the opinion never mentioned, let alone evaluated, the text or evolution of the statute. *Id.*

With regard to the lower court's conclusion that amended § 1997e imposes no obligation on prisoners to exhaust state administrative claim procedures, the court remarked that "[i]t does not appear that Congress intended such a change." Appendix 13a. This comment, however, was perfunctory and unsupported. In fact, legislative history supports a conclusion that Congress wanted inmates to exhaust administrative claim processes

in addition to prison grievance procedures. 141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo) (referring to the need to amend § 1997e to prevent inmates from circumventing "the congressionally created Federal Tort Claims Act" when filing *Bivens* actions).

The Ninth Circuit's decision "impose[s] an enormous loophole in the PLRA, which Congress clearly did not intend." *Alexander v. Hawk*, 159 F.3d at 1326. The text of amended § 1997e, its rejection of the earlier statute's requirement that the administrative remedy be effective, and other legislative circumstances confirm that Congress intended by its amendment to require the administrative exhaustion of all claims by prisoners before initiating federal litigation, regardless whether all aspects of the particular relief desired are procurable in the administrative process. The Ninth Circuit ignored congressional intent, and this petition should be granted to review and correct the lower court's error.

III.

THE QUESTIONS PRESENTED ARE IMPORTANT.

By equating "available" remedies with "effective" ones, the court of appeals wrongly presumed that only the inmates' interests are important in considering § 1997e's exhaustion requirement. Just because an administrative procedure cannot grant an inmate everything he might gain in federal litigation does not mean that the process is unavailable or fails to promote worthwhile social interests. This petition should be granted because the Ninth Circuit's decision undermines the important goals of reducing prisoner litigation, promoting efficient case management, and minimizing court intrusion in prison affairs.

First, if allowed to stand the decision will increase prisoner litigation. Under the Ninth Circuit's construction of amended § 1997e, prisoners must simply assert a claim for damages, or seek some other type of relief that cannot be bestowed in the administrative process, to avoid exhaustion requirements. This interpretation will encourage inmates to file such claims -- a result directly contrary to congressional intent. Among other reasons, the PLRA was enacted to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H14078-02, *H14106 (statement of Rep. Canady).

Reducing prisoner litigation is a worthwhile goal that should not have been casually overlooked by the court below. Prisoner cases constitute a large percentage of the federal docket. By 1995 more than twenty-five percent of the suits filed in federal district court were brought by prisoners. *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (citing Administrative Office of the United States Courts, 1995 Federal Court Management Statistics 167). In enacting the PLRA, senators emphasized that the number of prisoner lawsuits "has grown astronomically -- from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14408-01, *S14413 (statement of Sen. Dole for himself and eleven other senators). The consequence of the lower court's decision will directly clash with Congress's desire to reduce the number of prisoner lawsuits.

Not only will the Ninth Circuit's decision encourage prisoners to bring more claims, judicial management of their cases will become increasingly cumbersome and complex. District courts will be forced to parse out inmate allegations to ascertain the exact relief sought and whether administrative remedies could have

provided an equivalent remedy. Contrary to the goal of uniform application of federal law, different rules of federal exhaustion will develop for every federal, state, and local penal system based on the peculiarities of their administrative processes. And when inmates who have failed to exhaust administrative remedies initiate actions seeking both damages and equitable remedies, their cases will become fragmented since, under the lower court's approach, exhaustion is required for only certain types of injunctions.

Prisoners' allegations cannot be classified as equitable or legal as neatly as the Ninth Circuit imagines. In this case, the court of appeals described respondent's allegations against officer Black as seeking only damages and concluded that administrative remedies were unavailable because money could not be awarded in CCI's internal grievance process. Appendix 6a-7a. But, in doing so, the court overlooked the fact that respondent also sued another correctional officer for making misrepresentations during an investigation, his supervisor for providing inadequate supervision and being biased in a disciplinary hearing, and the warden of CCI for promoting illegal policies. Appendix 38a-40a. If respondent had filed a prison grievance, his supervisory and policy charges could have been examined and corrective measures might have been initiated. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy v. Madigan,* 503 U.S. at 145. "And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration . . . ." *Id.* The Ninth Circuit ignored these pragmatic considerations.

Finally, the Ninth Circuit's decision undermines Congress's goal of minimizing judicial intrusion in prison affairs. *See, e.g.*, 142 Cong. Rec. S3703-01, *S3704 (statement of Sen. Abraham) ("Our proposals will return sanity and State control to our prison systems."); 141 Cong. Rec. S144611-01, *S14626 (statement of Sen. Dole) ("These guidelines will work to restrain liberal Federal judges . . . who have used these complaints to micromanage State and local prison systems."); *Id.* at *S14627 (statement of Sen. Hatch) ("[I]t is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators . . . ."); 141 Cong. Rec. H1472-06, *H1480 (statement of Rep. Canady) ("The bill also provides much needed relief for States dealing with the problem of frivolous litigation by prisoners and unreasonable Federal court intervention in the operation of jails and correctional facilities.").

Requiring exhaustion gives prison officials the first opportunity to address inmate grievances, correct possible wrongdoing, and mitigate damages. Providing prison administrators with the ability to resolve problems early and outside the context of litigation advances Congress's interests in curbing frivolous lawsuits, promoting efficient case management, and discouraging judicial intervention in prison affairs. The Ninth Circuit's holding undermines these interests. Accordingly, the Court should grant this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 23, 1999.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MACARTHUR RUMBLES, **Plaintiff-Appellee,** **v.** **DONALD R. HILL, BLACK AND BECKETT,** **Defendants-Appellants.**	**No. 98-16794** **D.C. No. CV-97-05553-AWI** **OPINION**

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted
April 12, 1999--San Francisco, California

Filed June 30, 1999

Before: Robert R. Beezer and Stephen S. Trott,
Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge King

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*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed an order of the district court. The court held that under the Prison Litigation Reform Act (PLRA), a prisoner's failure to exhaust administrative remedies does not deprive a federal court of subject-matter jurisdiction over a claim under 42 U.S.C. § 1983, when the inmate seeks only money damages that are not available through the prison's grievance process.

As amended by the PLRA, 42 U.S.C. § 1997e(a) provides that a prisoner may not bring an action with respect to prison conditions under § 1983 or other federal law unless available administrative remedies are exhausted.

A California prisoner, appellee MacArthur Rumbles filed a pro se § 1983 action alleging various wrongs he suffered at the hands of a prison guard. He sought injunctive relief and money damages.

The district court determined that it lacked power to grant the injunctive relief Rumbles sought, but addressed the action as one for money damages only. The court held that because California's administrative prison grievance process does not allow for money damages, that form of relief was not an "available" remedy that had to be exhausted before a prisoner can bring a § 1983 action. The court also ruled that exhaustion was not required under the California Tort Claims Act (CTCA).

On appeal, appellant Donald Hill and other State prison officials contended that § 1997e(a)'s exhaustion requirement is jurisdictional, and that a prisoner seeking monetary relief must exhaust administrative remedies even when they do not afford monetary relief. Hill also argued that in addition to prison grievance procedures, Rumbles had a remedy "available" under the CTCA that he was required to exhaust.

[1] A statute requiring exhaustion of administrative remedies may be jurisdictional if it is more that a codified requirement of administrative exhaustion, and contains sweeping and direct language that goes beyond a requirement that only exhausted actions be brought. [2] Section 1997e(a) contains no such sweeping and direct language. It simply codifies the administrative exhaustion doctrine that governs the *timing* of federal-court decisionmaking.

[3] Under companion provisions of the PLRA, district courts are required to screen prisoners' complaints and dismiss those that are frivolous, malicious, fail to state a claim, or seek monetary relief from a defendant who is immune from such relief. The statute permits district courts to dismiss such claims on the merits even when administrative remedies have not been exhausted. The court would not be empowered to do so if the exhaustion provision deprived the court of jurisdiction over the action. Section 1997e(a) is not jurisdictional.

[4] Exhaustion of administrative remedies under § 1997e(a) is not required if a prisoner's § 1983 claim seeks only money damages and the correctional facility's administrative process does not allow for such an award.

[5] The PLRA did not overrule the well-established principle that exhaustion of state tort remedies is not required before bringing a § 1983 action. [6] The language

of the PLRA and the pre-PLRA version of § 1997e indicate that Congress had internal prison grievance procedures in mind when it passed the PLRA. [7] Decisions from every district court in California have concluded that the CTCA procedure is not an administrative remedy that a prisoner must exhaust under § 1997e(a). Legislative history also suggests that "administrative remedies" refers exclusively to prison grievance procedures.

[8] The CTCA procedures - including the requirement that a state tort claim first be presented to the State Board of Control - are not "available administrative remedies" that a prisoner must exhaust for purposes of § 1997e(a).

COUNSEL

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OPINION

KING, District Judge:

INTRODUCTION

Donald R. Hill, K. Black, and J. Beckett (collectively, "Hill") appeal interlocutorily an order

denying their motion to dismiss MacArthur Rumbles' prisoner 42 U.S.C. § 1983 action for failure to exhaust administrative remedies as required by 42 U.S.C. § 1997e(a). We have jurisdiction pursuant to 28 U.S.C. § 1292, and we affirm. We hold that the failure to exhaust administrative remedies under section 1997e(a) does not deprive a federal court of subject matter jurisdiction where money damages is the sole relief sought and where such a remedy is not available through the prison's administrative grievance process.

DISCUSSION

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA") (amending 42 U.S.C. § 1997e(a). As amended by the PLRA, section 1997e(a) provides:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Prior to the PLRA, section 1997e contained a comparatively lenient exhaustion requirement for prisoner cases that directed courts to "continue . . . [a prisoner section 1983] case for . . . [up to] 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available" if the court "believes that such a requirement would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1)

(1994); *see Patsy v. Board of Regents,* 457 U.S. 496, 511 (1981). The pre-PLRA version of the statute also required the Attorney General to certify that those administrative remedies were "in substantial compliance with the minimum acceptable standards promulgated under subsection (b)"[1] or were "otherwise fair and effective." 42 U.S.C. § 1997e(a)(2) (1994); *see Patsy,* 457 U.S. at 510-11. The PLRA, however, deleted the statutory phrase "plain, speedy, and effective" and eliminated the requirement that administrative remedies meet "minimum acceptable standards" or otherwise be "fair and effective." The amended version of section 1997e now simply requires the exhaustion of "such administrative remedies as are available." In contrast to the pre-PLRA version of section 1997e, this new exhaustion requirement is mandatory. *See Garrett v. Hawk,* 127 F.3d 1263, 1265 (10th Cir. 1997) ("Congress amended § 1997e to make the exhaustion provision mandatory rather than discretionary").

Rumbles' pro se complaint alleged, among other things, that a prison guard spit on him, called him racial epithets, and assaulted or threatened to assault him. He sought injunctive type relief (an apology from Hill and a federal investigation into "new California laws that are stiffer on repeat offenders and [the] effect [of such laws] on the conduct of Correctional Officers"), as well as

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[1]Subsection (b) directed the Attorney General, following consultation with experts in the field, to promulgate "minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility . . . ." 42 U.S.C. § 1997e(b)(1) (1994).

monetary damages for excessive force.[2] The district court held that it had no power to conduct its own investigation into "how state laws might be affecting correctional officers" and that it could not compel a party to apologize. Because the only cognizable remedy was claim for damages, the district court properly analyzed the action as one seeking only damages.[3]

The district court held that because California's administrative prison grievance process does not allow for monetary damages, this form of relief does not constitute an "available" remedy that must be exhausted before bringing a section 1983 action. The district court also held that exhaustion of state administrative procedures under the California Tort Claims Act is not required before filing a section 1983 action.

The primary questions on appeal are whether exhaustion of administrative remedies is a jurisdictional requirement under 42 U.S.C. § 1997e and whether exhaustion is mandatory even where the process would be futile. What does "available" mean as that term is used in section 1997e(a)? These are all questions of law reviewed de novo. *See Tierney v. Kupers,* 128 F.3d 1310, 1311 (9th Cir. 1997) (interpretation of statute is a question of law reviewed de novo).

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[2]Rumbles argues on appeal that his excessive force claim is not "with respect to prison conditions." In doing so, Rumbles is arguing that he need not exhaust administrative remedies because this claim is not governed by section 1997e(a). We decline to address this issue because it was not raised below. *See United States v. Flores-Payon,* 942 F.2nd 556, 558 (9th Cir. 1991) ("Issues not presented to the trial court cannot generally be raised for the first time on appeal.").

[3]Rumbles makes it clear in his brief on appeal that he has waived any claim for injunctive-type relief.

A.

Initially, Hill argues that section 1997e(a)'s exhaustion requirement is jurisdictional. That is, Hill claims that a district court may never reach the merits of a prisoner's section 1983 claim unless all available administrative remedies have been exhausted. We disagree.

The Supreme Court case that provides guidance for determining whether a statutory exhaustion requirement is jurisdictional is *Weinberger v. Salfi,* 422 U.S. 749, 757 (1975). In *Weinberger,* the Court considered language from the Social Security Act that read: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under [section 1331 et seq.] of Title 28 to recover on any claim arising under [Title II of the Social Security Act]." *Id.* at 756 (quoting 42 U.S.C. § 405(h) (1970) (alterations in original). The Court rejected the interpretation that this was a non-jurisdictional provision that "amounted to no more than a codification of the doctrine of exhaustion of administrative remedies." *Id.* at 757.

[1] Instead, the Court held that "this provision bars district court federal-question jurisdiction over suits . . . . That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language, which is sweeping and direct and which states that no action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Id.* Thus, a "statute requiring exhaustion of administrative remedies may be jurisdictional if it is 'more than a codified requirement of administrative exhaustion' and contains 'sweeping and direct' statutory language that goes beyond a requirement that only exhausted actions be brought." *Underwood v. Wilson,* 151 F.3d 292, 294 (5th Cir.

1998) (quoting Weinberger, 422 U.S. at 757), *cert. denied*, 119 S. Ct. 1809 (1999).

[2] As the Fifth Circuit observed in Underwood, "§ 1997e(a) contains no such sweeping and direct language barring federal question jurisdiction under 28 U.S.C. § 1331." *Id.* Section 1997(e)(a) "merely provides that '[n]o action shall be brought ... until such administrative remedies as are available are exhausted.' This is a precisely the type of language held in *Weinberger v. Salfi* not to limit federal jurisdiction." *Id.* We agree with the Fifth Circuit and hold that section 1997e(a) simply codifies the administrative exhaustion doctrine that is "one among related doctrines - including abstention, finality, and ripeness - that govern the timing of federal-court decisionmaking." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (emphasis added). The balance of existing authority supports this view. *See Wright v. Morris*, 111 F.3d 414, 421 (6th Cir.) ("Section 1997e(a), in contrast, contains neither the sweeping and direct language of [the statute at issue in *Weinberger*] nor the statute's explicit bar to district court jurisdiction.) *cert. denied*, 118 S. Ct. 263 (1997); Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199, 1203 (E.D. Cal. 1997) (section 1997e(a) does not limit federal court jurisdiction). *But see Morgan v. Arizona Dept. of Corrections*, 976 F. Supp. 892, 895 (D. Ariz. 1997) (section 1997e(a) exhaustion requirement is jurisdictional).

[3] This conclusion is further compelled by 42 U.S.C. §§ 1997e(c)(1) & (2), companion provisions of the PLRA. Under those provisions, district courts are required to screen prisoners' complaints and to dismiss those that are "frivolous, malicious, fail[] to state a claim ..., or seek[] monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(2). The statute specifically permits district courts to dismiss such claims on the merits even where administrative remedies have not been exhausted. *See id.* "The court would not be

empowered to do so if the exhaustion provision deprived the court of jurisdiction over the action." *Underwood*, 151 F.3d at 295; *see Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (a court has no power to reach the merits of a claim if it lacks jurisdiction); *see generally In re Burns*, 974 F.2d 1064, 1066 (9th Cir. 1992) (a court should avoid a statutory interpretation that "fails to give effect to every subsection" of a law). In short, section 1997e(a) is not jurisdictional.

B.

Even if exhaustion is not jurisdictional under the PLRA, Hill argues that a prisoner seeking monetary relief must nevertheless exhaust administrative remedies even where monetary relief is not available within the prison grievance system. Because the California Department of Corrections ("CDC") grievance procedures do not allow for monetary damage awards,[4] *see Lacey*, 990 F. Supp. At 1205 ("[CDC] grievance process does not provide for monetary relief"), the question is whether those procedures are an "available remedy" where a prisoner seeks only monetary damages.

Authorities are split. *See Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888 (S.D.N.Y. 1998) (federal courts "have differed ...about whether to apply § 1997e(a) where plaintiffs seek money damages and such relief is not 'available' through the administrative process") (collecting cases). *Compare, e.g., Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (§ 1997e(a)'s exhaustion requirement applies only to the extent that the administrative process could provide the relief sought) and

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[4]Although the CDC grievance procedures authorize up to $100 of compensation for property damage, see Cal. Code Reg. Tit. 15 §§ 3084.1 3084.7, Rumbles does not seek relief for property damage.

Whitley v. Hunt, 158 F.3d 882, 886-87 (5th Cir. 1998) (same) with *Alexander v. Hawk*, 159 F.3d 1321, 1326 (1th Cir. 1998) (exhaustion mandatory even where the administrative process does not provide the requested relief; "available remedy" does not mean "adequate remedy"). Ultimately, however, the case on appeal is governed by our decision in *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998).

In *Lunsford*, we were reviewing the claim of a federal prisoner "seek[ing] only damages in his [*Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)] action for claims arising from past conduct by prison officials ...." 155 F.3d at 1179. We held that Lunsford was ... not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [Bureau of Prison's] Administrative Remedy Program only provides for injunctive relief." *Id.* The holding in *Lunsford* amounts to a rules that federal prisoners pressing *Bivens* claims need not pursue prison remedies when they are seeking exclusively monetary relief, and there are no prison remedies capable of affording such relief. In this regard, *Lunsford* is consistent with pre-PLRA law. *See McCarthy*, 503 U.S. at 149 (prisoner need not exhaust administrative remedies before pursuing *Bivens* claim for damages); *Cooney v. Edwards*, 971 F.2d 345, 346 (9th Cir. 1992) (same).

[4] The district court in the instant case simply extended *Lunsford*'s reasoning from a *Bivens* action to Rumbles' section 1983 action, and held that Rumbles need not exhaust the CDC grievance process because it does not provide for monetary relief. Extending *Lunsford* from a *Bivens* action to a section 1983 action is logical. "Actions under § 1983 and those under Bivens are identical save for the replacement of a state actor under § 1983 by a federal actor under Bivens." *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991). More

importantly, in the PLRA Congress included prisoner *Bivens* actions within the statutory reach of section 1997e(a). *See Garrett*, 127 F.3d at 1265 ("Because § 1997e pertains to 'any action brought ...under ... any [] Federal law, by a prisoner confined in any jail, prison or other correctional facility,' the exhaustion requirements now apply to *Bivens* suits brought by federal prisoners against federal officials as well.") (emphasis and alterations in original); *Alexander*, 159 F.3d at 1325 ("Congress intended the PLRA section 1997e(a) to apply to both state and federal prisoners.") Accordingly, we extend *Lunsford* to section 1983 actions. Exhaustion of administrative remedies under section 1997e(a) is not required if a prisoner's section 1983 claim seeks only money damages and if the correctional facility's administrative grievance process does not allow for such an award.

C.

[5] Hill argues that, in addition to prison grievance procedures, Rumbles had "available" an administrative remedy under the California Tort Claims Act ("CTCA") that he was required to exhaust before bringing his section 1983 suit. In particular, Hill contends that Rumbles could have filed a claim with the California State Board of Control, the agency empowered to review and pay claims against all state agencies, including the CDC. To adopt this argument, however, we must find that the PLRA overrules the well-established principle that exhaustion of state tort remedies is not required before bringing a section 1983 action. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 480 (1994) ("In general, exhaustion of state remedies is not a prerequisite to an action under quotation marks and alterations omitted); *Felder v. Casey*, 487 U.S. 131, 140-41 (1988) (state notice-of-claim statutes are inapplicable to section 1983 suits); *Patsy*, 457 U.S. at 516 ("exhaustion of state remedies should not be required as a prerequisite to bringing an action pursuant to § 1983").

[6] It does not appear that Congress intended such a change. The language of the PLRA, as will the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust state tort claim procedures. For example, section 1997e(b) tellingly provides that "the failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action" (emphasis added). "It thus appears that throughout § 1997e Congress is referring to institutional grievance processes and not state tort claims procedures." *Lacey*, 990 F. Supp. at 1206.

> [T]he only federal courts considering the issue [whether state notice-of-claim procedures are an "administrative remedy"] post-PLRA conclude that the legislative history which is both pre- and post-PLRA) "seems to indicate that the drafters did not intend to require prisoners to exhaust state tort remedies before filing a federal civil rights claim. It implies that Congress merely intended to require exhaustion of prison grievance procedures."

Blas v. Endicott, 31 F. Supp. 2d 1131, 1132 (E.D. Wisc. 1999) (quoting *Barry v. Ratelle*, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997); *cf. Jenkins v. Morton*, 148 F.3d 257, 259 (3rd Cir. 1998) (under revised section 1997e)(a) a prisoner need not exhaust state judicial remedies before filing a section 1983 action).

[7] Moreover, in analyzing the specific California notice-of-claim procedure at issue here, decisions from every district court in California have concluded that the CTCA procedure is not administrative remedy that a

prisoner must exhaust under section 1997e(a). *See, e.g., Lacey*, 990 F. Supp. at 1206-08; *Barry*, 985 F. Supp. At 1238; *Plasencia v. California*, 29 F. Supp. 2d 1145, 1148-49 (C.D.Cal. 1998); *Palomino v. Stanton*, No. C 96-2984 FMS, 1998 WL 196461, *2 (N.D. Cal. April 21, 1998); *King v. Steinberg*, No. C 97-3090 CRB, 1998 WL 473899, *2 (N.D. Cal. July 31, 1998). Legislative history also suggests that the summary phrase "administrative remedies" refers exclusively to prison grievance procedures. Senator Kyl, one of the co-sponsors of the PLRA, testifies:

> Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits.... Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.

141 Cong. Rec. S7526-7527 (May 25, 1995) (emphasis added).

In contrast, Congress gave no indication that it intended to overrule the settled understanding that the phrase "administrative remedies" in section 1997e does not include state notice-of-claim procedures. *See Lacey*, 990 F. Supp. at 1206; *cf. Felder*, 487 U.S. at 140-41 (state notice-of-claim statutes are inapplicable to section 1983 suits). "This absence of congressional intent is particularly significant given that federal courts have traditionally held that such requirements, including those contained in the California Tort Claims Act, are inapplicable in federal civil rights actions." *Lacey*, 990 F. Supp. At 1206-07 (collecting cases).

[8] Accordingly, we hold that California Tort Claims Act procedures -- including the requirement that a state

tort claim first be presented to the California State Board of Control -- are not "available administrative remedies" that a prisoner must exhaust for purposes of section 1997e(a).

CONCLUSION

The district court's order denying Hill's motion to dismiss is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF CALIFORNIA

MACARTHUR RUMBLES, **Plaintiff,** **v.** **D.R. HILL, et al.,** **Defendants.**	**CV F 97-5553 AWI SMS P** **MEMORANDUM OPINION AND ORDER RE: FINDINGS AND RECOMMENDATIONS FILED APRIL 30, 1998 ADDRESSING DEFENDANTS' MOTION TO DISMISS [Doc. 19]**

Pending before the court are the Magistrate Judge's Findings and Recommendations filed April 30, 1998. After consideration of the Findings and Recommendations, the entire court file, the applicable statutes, and relevant caselaw, the court will deny defendants' motion to dismiss for the modified reasons set forth below.

PROCEDURAL HISTORY & FACTUAL ALLEGATIONS

On December 9, 1996 Rumbles' Complaint was received by the Clerk of the United States District Court, Central District of California, and it was lodged the following day. On April 29, 1997 Rumbles' Complaint was filed in the Central District.

In his complaint Rumbles alleges that K. Black spit on him, referred to him with coarse racial and sexual epithets, threatened him with violence, handcuffed him

and took him to an office where she told him she would see that he was place him in a heightened security portion of the California Correctional Institution at Tehachapi. Rumbles further alleges that Black took such actions with the permission of her supervisor Lt. T. Meadors, who is alleged to have told Rumbles that Black could do anything she wanted to get her job done. Rumbles also claims that he was found guilty of unspecified charges at a disciplinary hearing related to Blacks conduct, and that J. Beckett did not conduct a fair investigation into the charges. Rumbles further asserts that the above conduct was taken pursuant to a policy of the warden, D. R. Hill.

On May 1, 1997 this action was transferred to the Eastern District.

On July 24, 1997 the Magistrate Judge granted Rumbles in forma pauperis status, and determined that Rumbles stated a cognizable claim against D. R. Hill, T. Meadors, K. Black, and J. Beckett.[1]

On November 14, 1997 the three served defendants filed the pending motion to dismiss for lack of subject matter jurisdiction on the basis that Rumbles had not exhausted his claims prior to filing this action. Rumbles did not file an opposition.

On April 30, 1998 the Magistrate Judge issued the pending Findings and Recommendations, to which defendants filed timely Objections on May 29, 1998.

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[1]All defendants have been served except for Meadors. As of the date of this Memorandum Opinion and Order the U.S. Marshal has been unable to locate Meadors.

LEGAL STANDARDS

When timely objections to findings by a magistrate judge are filed, this court must conduct a de novo determination of the findings. 28 U.S.C. §636(b)(1). Regardless of whether objections to findings are filed, this court must conduct a de novo review of a magistrate judge's recommendations as to issues of law. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

Given the nature of defendants' motion the Findings and Recommendations presently before the court do not include proposed factual findings, but solely contain conclusions of law relating to the statutory interpretation of 42 U.S.C. § 1997e(a). As such the court must conduct a de novo review of the entire Findings and Recommendations.

For the reasons set forth below, the court will analyze defendants' motion to dismiss pursuant to Fed.R.Civ.P. 56. If the moving party offers "matters outside the pleading" in support of the motion, Rule 12(b) provides that the motion be analyzed pursuant to the standards of Rule 56.

Summary judgment shall be granted where there exists no genuine issue as to any material fact, and the undisputed facts entitle the moving party to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial duty to inform the district court of the bases for its motion, and to identify the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Where the opposing party does not file an opposition to the motion, that failure cannot be deemed to be

consent to the granting of the motion. Evans v. Independent Order of Foresters, __ F.3d __, 1998 WL 154583 (9th Cir. 1998). Instead the district court must determine whether the moving papers and evidence are sufficient to establish the lack of any triable issue of fact, and that the movant is entitled to judgment. Id.

DISCUSSION

Defendants raise two separate contentions regarding exhaustion. First defendants claims that Rumbles cannot prove his allegation that he filed two administrative appeals within the institution. Second defendants contend that Rumbles has not presented his damages claim to the state Board of Control.

I. Defendants' Motion To Dismiss For Lack of Subject Matter Jurisdiction Will Be Construed As A Motion For Summary Judgment

Defendants have noticed their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), contending that if a prisoner has not exhausted available administrative remedies as required by 42 U.S.C. § 1997e(a), that failure deprives a court of subject matter jurisdiction over the action.

As will be explained, the court finds that the failure to prove exhaustion of administrative remedies required by section 1997e(a) is not a jurisdictional bar, but is a failure to state a valid claim for relief. Defendants' motion to dismiss for lack of subject matter jurisdiction, because it relies on extrinsic evidence to show that Rumbles cannot prove that he exhausted his claims, must be analyzed under Fed. R. Civ. P. 56.

Prior to April 26, 1996 prisoners were not, as a rule, required to exhaust administrative remedies before filing

a federal civil rights action. The former section 1997e(a)(1) provided that a district court "shall, if the court believes that [exhaustion of administrative remedies] would be appropriate and in the interests of justice," continue the action for 180 days or less "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." The former section 1997e(a)(2) stated that such exhaustion "may not be required unless [either] the Attorney General has certified or the court has determined that [the] administrative remedies" met certain specified standards set forth in another sub-section of the former section 1997e. Under the former law a district court lacked authority to dismiss an action by a state prisoner for failure to exhaust administrative remedies. At most the court could stay the action for up to 180 days if it found that exhaustion was required in the interests of justice and that the state's prison grievance procedure set certain minimum standards. Francis v. Marquez, 741 F.2d 1127 (9th Cir. 1984).

In 1996 Congress enacted the PLRA, the date of enactment being April 26, 1996, Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997), thus applicable to this action originally filed after that date. As part of the PLRA Congress amended section 1997e(a) to require that a prisoner first exhaust all available administrative remedies before the prisoner could bring an action under federal law challenging the conditions of confinement. Because the new language of 1997e(a) regarding exhaustion is expressly mandatory in nature, defendants contend that this court lacks subject matter jurisdiction over this action if Rumbles cannot prove that he exhausted his claims.

The Ninth Circuit has not considered whether the failure of a prisoner to plead exhaustion of administrative remedies deprives a district court of subject matter

jurisdiction over the action. No other Circuit has expressly found that the statute is jurisdictional as to claims filed after the date of the enactment of the PLRA.[2] District courts within the Ninth Circuit have split on this issue. Lacey v. C.S.P. Solano Med. Staff, 990 F. Supp. 1199, 1203 (E.D. Cal. 1997) (exhaustion requirement in section 1997e(a) is not jurisdictional); Palomino v. Stanton, 1997 WL 350099 (N.D. Cal. 1997) (same); contra Morgan v. Arizona Dep't of Corrections, 976 F. Supp. 892 (D. Az. 1997) (exhaustion requirement in section 1997e(a) is jurisdictional); Hernandez v. Browman, 1997 WL 383155 (N.D. Cal. 1997) (same).

A district court should avoid a statutory construction that "fails to give effect to every subsection" of a law. In re Burns, 974 F. 2d 1064, 1066 (9th Cir. 1992).

If section 1997e(a) stood alone, it would be reasonable to interpret the statute's language, "no action shall be brought" until all "available" administrative remedies are "exhausted," to mean that a federal court should not decide the merits of a claim, or otherwise adjudicate the claim, until after exhaustion of administrative remedies. Jervis v. United States, 966 F. 2d 517, 518-19 (9th Cir. 1992) (interpreting statutory language that "an action shall not be instituted upon a [certain type of] claim ... unless the claimant shall have first presented the claim to the appropriate Federal agency" to be jurisdictional). However, interpreting section 1997e(a) in such a manner would not be proper because it would fail

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[2]The Sixth Circuit held that a district court has jurisdiction to hear the claim of a prisoner who filed a federal civil rights action before the date of the enactment of PLRA, but did not plead exhaustion of administrative remedies. Wright v. Morris, 111 F.3d 414, 420-21. The Sixth Circuit expressly declined to decide whether "district courts can exercise jurisdiction over unexhausted prisoners" claims filed after the PLRA's enactment." Id. at n. 10.

to give any effect at all to another portion of the PLRA, specifically section 1997 e(c)(2).

Congress, at the same time it amended section 1997e(a), also amended section 1997e(c). That section now explicitly grants a district court the power to dismiss certain prisoner claims on the merits even where a prisoner has not pleaded exhaustion of administrative remedies. In order for a district court for follow the congressional mandate of section 1997e(c)(2) and dismiss prisoner claims that are frivolous, malicious, or fail to state a claim, the court must consider the merits of the claim as pleaded. It is elementary that a district court has no power to consider the merits of a claim if it lacks subject matter jurisdiction over the action. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379-80 (1981).

Further, if defendants were correct that this court lacked subject matter jurisdiction over prisoner claims that have not been exhausted, and this court were to dismiss such a claim due to frivolousness pursuant to section 1997e(c)(2), the order of dismissal and resulting judgment would be void and of no legal effect. Watts v. Pinckney, 752 F. 2d 406, 409 (9th Cir. 1985) (judgment is void if court granting judgment lacked subject matter jurisdiction over the action).

Acceptance of defendants' proposed interpretation of section 1997e(a) as jurisdictional would also mean that at any time in the future a prisoner could rightfully move under Fed. R. Civ. P. 60(b)(4) to vacate a dismissal granted pursuant to section 1997e(c)(2) simply because the prisoner had not exhausted his claim. Wages v. Internal Revenue Service, 915 F. 2d 1230, 1234 (9th Cir. 1990), cert. denied, 498 U.S. 1096 (1991).

Additionally, under defendants' proposed interpretation a judgment entered pursuant to section

1997e(c)(2) in an action where the prisoner had not exhausted his claims would have no res judicata effect in future actions. Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1390-91 (9th Cir. 1988).

The results that would necessarily follow from defendants' proposed interpretation are patently at odds with congressional intent to lessen the burden on the courts and on society resulting from the filing and prosecution of frivolous federal claims by prisoners, mostly in forma pauperis. See Hadix v. Johnson, - F.3d -, 1998 WL 177343 at *4 (6th Cir. 1998); Roller v. Gunn, 107 F.3d 227, 230-31 (4th Cir. 1997).

The court finds that section 1997e(a) is a codification of the exhaustion doctrine as to federal claims brought by prisoners challenging the conditions of confinement. As such the requirement addresses the timing of the bringing of such actions. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ("[t]he doctrine of exhaustion of administrative remedies is one among related doctrines-including abstention, finality, and ripeness-that govern the timing of federal court decisionmaking"). Because a prisoner may not bring such an action until available administrative remedies have been exhausted, the failure to prove or plead such exhaustion is a failure to state a valid claim. See Alexandroai v. California Dep't of Corrections, 985 F. Supp. 968, 970 (S.D. Cal. 1997); Barry v. Ratelle, 985 F. Supp. 1235, 1236 (S.D. Cal. 1997).

II. Defendants' Motion Construed As A Motion For Summary Judgment Is Denied

Before addressing defendants' motion on the merits, the court finds it necessary to determine the nature of the relief sought by Rumbles, and whether such relief can be obtained from a federal court. Rumbles seeks as relief (1) damages, (2) a formal apology from defendant Hill and

other unspecified staff at the Tehachapi institution, and (3) a federal investigation into unspecified state laws that "are stiffer on repeat offenders and [their] effect on the conduct of Correctional officers." The court finds that the doctrine of federalism prohibits the court from undertaking its own investigation into how state laws might be affecting correctional officers. See, Union County Jail Inmates v. DiBuono, 713 F.2d 984, 1001 (3rd Cir. 1982) (Eighth Amendment does not give federal courts "a roving commission" to impose upon states its "own notions of enlightened policy"). The court further finds that it is outside the power of the court to compel a party to apologize to another party. Therefore the only legally or equitable recognizable remedy that Rumbles seeks in this action is his claim for damages. The court will analyze this action as one seeking "only damages."

Defendants offer extrinsic evidence to prove that Rumbles did not file an administrative appeal with the CDC regarding the claims in this action, and that he did not present his damages claim to the state Board of Control. The court finds that defendants have not meet their initial burden pursuant to Rule 56 because such a showing does not entitle them to judgment as a matter of law.

The Ninth Circuit recently held that where a prisoner files a Bivens action seeking "only damages" against federal actors, that prisoner is "not required to exhaust his administrative remedies before filing this lawsuit in the district court in light of the fact that the [federal prison administrative grievance program] only provides for injunctive relief." Lunsford v. Jumao-As, 139 F.3d 1233 (9th Cir. 1998). For this proposition, the Ninth Circuit cited to section 1997e(a), thus signaling that it was interpreting that statute, and to Honig v. Doe, 484 U.S. 305, 327 (1988). Honig discussed exhaustion in the context of claims brought pursuant to the Education of the

Handicapped Act, and noted that the party seeking relief under that Act "may bypass the administrative process where exhaustion would be futile or inadequate." Id.

Prior to the enactment of the PLRA, a district court did not have the discretion under the former section 1997e(a)(1) to order federal prisoners exhaust their claims under the federal prison administrative process. However the amended section 1997e(a) now requires that both federal and state prisoners exhaust such remedies as are available. Lunsford is binding authority that a federal prisoner seeking "only damages" need not exhaust that claim before the federal prison grievance procedure since that procedure does not allow for the issuance of monetary relief. Because section 1997e(a) makes no distinction between federal and state prisoners, the court finds that Lunsford is equally applicable to state prisoners with "only damages" claims where the state prison administrative grievance system does not provide for monetary relief. Because the CDC appeal process does not provide for monetary relief, except for claims of $100 or less from lost or damaged personal property, Cal. Code. Reg., tit. 15, §§ 3084.1 - 3084.7, 3084.7(e), Rumbles "was not required to exhaust all his administrative remedies" provided by the CDC. Lunsford, 139 F.3d at 1233.

Unlike the CDC administrative remedy system, however, no binding authority exists to advise the court as to whether a prisoner seeking damages must present his claim to the state Board of Control prior to filing a court action for damages.

Under the California Torts Claims Act ("CTCA"), Cal. Gov't Code §§ 810 et seq., a damages action may not be maintained against a state agency or against state actors unless the claim is first timely presented to the state Board of Control. Cal. Gov't Code §§ 910-913.2, 945.4,

950.2. The California State Legislature created the CTCA in response to Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211 (Cal. 1961), which had abrogated common law governmental immunity from tort liability. Donovan v. Reinbold, 433 F.2d 738, 741 (9th Cir. 1970). The CTCA "abolished all court declared and common law based forms of tort liability of public entities in the state, with some exceptions, and substituted therefor a statutory system of liability and immunity, together with a procedural scheme to enforce the system." Id. Integral to this "procedural scheme" is the presentation of the damages claim within a specified time period. Id.

Prior to the enactment of the PLRA, the Ninth Circuit held that a defendant in a federal civil rights prisoner action could not raise the prisoner's failure to comply with the CTCA as a defense. New v. California, 439 F.2d 1285, 1287 (9th Cir. 1971) (citing Donovan, 433 F.2d 741-742). The holding was correct given that the Supreme Court later held that the Supremacy Clause and general principles of federalism preempted application of state "notice-of-claim statutes" to federal civil rights causes of action, and specifically to 42 U.S.C. § 1983. Felder v. Casey , 487 U.S. 131, 150-153 (1988).

Felder noted that "Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." Id. At 141. While this was undisputedly the law prior the enactment of the PLRA, defendants maintain that Congress has now expressly stated that prisoners must in fact present their claims to the state Board of Control because the CTCA is an administrative remedy which is available.

Defendants contend that when a prisoner files a written grievance with the prison that seeks financial

compensation over $100, the prisoner is notified that he or she may pursue that complaint with the state Board of Control. Cal. Code. Reg., tit. 15, §§ 3084.7(e)(4)(B). Certainly a California state prisoner can file a damages claim against the CDC with the state Board of Control, and therefore such a remedy is available to a prisoner. The question remains as to whether Congress intended to include state tort claim presentation procedures, such as the CTCA, within the meaning of "administrative remedy" as that phrase is used in section 1997e(a).

This court is aware of two published cases have addressed this issue, and both concluded that the CTCA claims presentation procedures are not "administrative remedies" within the meaning of section 1997e(a). Lacey v. C.S.P. Solano Medical Staff, 990 F. Supp. 1199, 1206-07 (E.D. Cal. 1997); Barry v. Ratelle, 985 F. Supp. 1235, 1238 (S.D. Cal. 1997).

The prior version of section 1997e(a)(1) gave district courts discretion under certain limited circumstances to stay a prisoner's federal civil rights claim for the purposes of requiring exhaustion of "administrative remedies." The prior section 1997e(a)(2) set forth the limited circumstances: the Attorney General had to certify, or the court had to determine, that the "administrative remedies" referred to in the former section 1997e(a)(1) met certain standards set forth in former section 1997e(b) or were otherwise fair and effective. Even a cursory reading of the former section 1997e(b) shows that Congress intended that the phrase "administrative remedies" within the former section 1997e(a)(1) to mean prison or jail grievance procedures. In addition to the plain wording of the former statute, no published decision of any court ever interpreted the phrase "administrative remedies" in former section 1997e(a)(1) to include state tort claims presentation procedures.

In amending section 1997e(a) Congress elected to continue to use the phrase "administrative remedies" within that subsection. When Congress amends a law, and includes sections of the prior law, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law." Lorillard v. Pons, 434 U.S. 575, 581 (1978). This court should therefore assume that Congress intended that the phrase "administrative remedies" in the amended version of section 1997e(a) would be given the same meaning that the exact phrase had in the prior form of that section.

Defendants do not point to any contrary legislative intent indicating that Congress intended to change the meaning of the phrase "administrative remedies" when it enacted the PLRA. To the contrary, Senator Kyl, one of the co-sponsors of the PLRA, made a statement on May 25, 1995 which in part included the following language, indicating that "administrative remedies" meant prison grievance systems:

> Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits.
> ...
> Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.

141 Cong. Rec. S7526-7527.

For the above reasons the court concludes that the tort claims presentation procedures mandated by the CTCA are not an "administrative remedy" within the meaning of section 1997e(a). Rumbles therefore need not

plead compliance with the CTCA to meet the exhaustion requirement.

CONCLUSION

Defendants' motion to dismiss, properly analyzed under Fed. R. Civ. P. 56 due to defendants' reliance on extrinsic evidence, must be denied. The court is bound by the statutory construction of 42 U.S.C. § 1997e(a) recently announced by the Ninth Circuit in Lunsford v. Jumao-As that prisoners seeking "only damages" need not exhaust administrative remedies with prison grievance systems that do not provide for an award of monetary damages.

Additionally 42 U.S.C. § 1997a(e) does not require Rumbles to present his damages claim to the State Board of Control prior to filing this action. The "failure" to file an action with the State Board of Control prior to filing this action is not a bar, jurisdictional or otherwise, to this federal action.

ORDER

For the reasons stated in the above Memorandum Opinion, IT IS HEREBY ORDERED that

1. Rumbles' requests for a federal investigation into the effect of state laws on corrections officers, and for an order requiring defendant Hill and unspecified persons to apologize, are DISMISSED;

2. the moving defendants' motion to dismiss, construed as a motion for summary judgment based on the failure to exhaust, is DENIED;

3. the moving defendants shall file their answers within twenty-one days of the filing of this

Memorandum Opinion and Order, plus an additional three days as provided by Fed. R. Civ. P. 6(e); and

4. all parties are ordered to include the correct case number CV F 97 5533 AWI SMS P, on all future filings.

DATED: June 19, 1998

/s/ Anthony W. Ishii
ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE

MacArthur Rumbles #E10187
Full Name

California Correctional Institution
Committed Name (if different)

P.O. BOX 680 STATE PRISON
Full Address Including Name of Institution

Tehachapi, CA 93581

#E-10187
Prison number (if applicable)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MacArthur Rumbles

Plaintiff,

vs.

D.R. Hill, Warden

T. Meadors, Correctional Lieutenant

K. Black, Correctional Officer

J. Beckett, Correctional Officer

Defendant(s).

Case No. CV 96-8602
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT PURSUANT TO (check one)

/x/ 42 U.S.C. §1983

or

/ / Bivens v. Six Unknown Agents

403 U.S. 388 (1971);
28 U.S.C. §1331

A. JURISDICTION

This Complaint alleges that the civil rights of plaintiff, MacArthur Rumbles
(print Plaintiff's name)
who presently resides at California Correctional Inst., P.O. Box 608, Tehachapi, CA 93581-4308 were
(mailing address or place of confinement)
violated by the actions of the below-named individuals, which actions were directed against plaintiff at California Correctional Institution, Tehachapi, CA
(institution/city where violation occurred)
on (dates) 10/05/96. 10/19/96. 11/11/96.
(Count 1) (Count II) (Count III)

(You need not name more than one defendant; however, make a copy of this page to provide the information below if you are naming more than five (5) defendants.)

1) Defendant D.R. HILL resides or works at
(full name of first defendant)
P.O. Box 608, Tehachapi, CA 93581,
(full address of first defendant)
and is employed as Warden.
(defendant's position and title, if any)
This defendant is sued
In his/her: ___individual X official capacity. (Check one or both).
Explain how this defendant was acting under color of law:
D.R. HILL is employed by the State of California as "Warden" and is responsible for the governing policies of California Correctional Inst.

2) Defendant T. Meadors resides or works at
(full name of Second defendant)
(Same as Above), and is employed as
(full address of Second defendant)
Correctional Lieutenant.
(defendant's position and title, if any)
This defendant is sued in his/her:
_individual X official capacity. (Check one or both).
Explain how this defendant was acting under color of law:
As a state-employed Correctional Lieutenant, T. Meadors, acted as supervisor of C/O Black and served as Senior Hearing Officer.

3) Defendant K. Black resides or works at
(full name of Third defendant)
(Same as Above), and is employed as
(full address of Third defendant)
Correctional Officer.
(defendant's position and title, if any)
In his/her: _individual X official capacity.
(Check one or both).
Explain how this defendant was acting under color of law:
C/O Black, violated my civil rights and assualted my person while acting as a state-employed Correctional Officer.

4) Defendant J. Beckett resides or works at
(full name of Fourth defendant)
(Same as Above), and is employed as
(full address of Fourth defendant)
Correctional Officer.
(defendant's position and title, if any)
This defendant is sued in his/her:
_ individual _X_official capacity.
(Check one or both).

Explain how this defendant was acting under color of law:
While serving as a Correctional Officer and as my official Investigative Employee, C/O Beckett, misrepresented my defense in order to protect his fellow employee - C/O Black.

5) Defendant _____ resides or works at
(full name of Fifth defendant)
_____, and is employed as
(full address of Fifth defendant)
_____. This defendant is sued
(defendant's position and title, if any)
Explain how this defendant was acting under color of law:

_____

6) Jurisdiction is invoked pursuant to:

/x/ 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983;

or

/ / Bivens v. Six Unknown Agents, 403 U.S. 388 (1971); 28 U.S.C. § 1331.
If you wish to assert jurisdiction under different or additional statutes, list them below.

_____

_____

B. NATURE OF THE CASE

1) Briefly state the background of your case.

I've suffered from a frivilous inmate disciplinary action which has tramatically affected my PTSD (Post Tramatic Stress Disorder) condition; and caused me to suffer nerve and urinary problems. These, as well as self-esteem problems, were brought about by the vindictive, unprofessional conduct of C/O Black.

C. CAUSE OF ACTION
COUNT I

The following civil right has been violated:

UNEQUAL TREATMENT

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

I was treated differently than other inmates in that C/O Black was permitted by her supervisor, Lieutenant T. Meadors, to spit in my face, threaten me, and call me derogatory names (such as nigger, dick-head, etc....).

COUNT II

The following civil right has been violated:

Cruel and Unusual Punishment/Abuse

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

It's very difficult (and embarrassing) to convey the extent of my suffering and damage resulting from C/O Black's unprofessional misconduct. On, or about, 10/05/96, in an effort to ask officer Black a question, I over-hear her speaking to other inmates. She was calling them "Dick-Heads". She said it several times when I spoke up and said "you're not suppose to use names like that when you speak to inmates". My comment obviously upsetted her and she responded by telling me, "Listen asshole, you don't tell me what I can and can't do. In here I'm God, and don't forget it. Now get the hell out of here!" Then, on or about 10/19/96 (9 days later) I found an anonymous note in my locker making deragotory statements about another C/O. This, I felt was a serious matter since I've seen inmates disciplined for this type of speaking before. I confrounted C/O Black (suspecting this to be a retaliatory act due to our

previous encounter). This time she escalated the situation by telling me. "If I wanted to set you up, I can think of a lot better ways to do. But, I've had just about enough of your nigger ass. I'm gonna crucify you, you black son-of-a-bitch. Get the fuck out of here!" While saying these things to me, she was poking her finger in my check and pushing me at the shoulder. Later, she returned and told me to turn around. She placed handcuffs on me. She then took me into

(Continued on Page #41a)

COUNT III

The following civil right has been violated:

Due Process/Unprofessional Actions of Officers

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each defendant (by name) did to violate your right].

On or about 11/04/96 I was approached by C/O Beckett. I was told he would be acting as my Investigative Employee. After explaining myself to him and giving him a list of names of possible witnesses, he concluded our meeting. I had no other contact with him until 11/11/96, when I recieved a copy of his report from the Senior Hearing Officer (Lt. T. Meadors) at my disciplinary hearing.

In both the investigative report and the hearing report my comments were grossly misrepresented and shortened. Several comments I made in my defense were not noted or ignord. There was an overwhelming posture that nothing would be done about C/O Black's conduct. They simply didn't want to hear about it. Hearings are supposed to be fair and impartial, this simply was not the case. I was found guilty long before I entered Lt. T. Meadors office.

I asked him if he condones the actions of C/O Black. His answer was, in essence, "whatever gets the job done". I have been convinced that this is the overall policy of D.R. Hill, the warden of this institution.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) Have you begun any other lawsuit(s) in any state or federal courts dealing with the same or similar facts involved in this action? __Yes _X_ No. If your answer is "YES", describe each lawsuit. (If more than one, describe the others on an additional page following this outline.)

a) Parties to previous lawsuit:
Plaintiff(s):_____

Defendant(s):_____

b) Name of Court and Docket No.: _____
_____

c) Disposition (for example, was the case dismissed, appealed or still pending?): _____
_____

d) Issues raised: _____
_____

e) Approximate date it was filed: _____
_____

f) Approximate date of disposition: _____
_____

2) I have previously sought informal or formal relief from the proper administrative officials regarding the acts alleged in Part C. X YES ___ NO. If your answer is "YES", briefly describe how relief was sought and the results. If your answer is "NO", briefly explain why administrative relief was not sought.

The proper method for seeking relief within the California Penal system is to fill out CDC Form #602 explaining your appeals. I have filed two (2) CDC Form #602s and have not recieved any response whatsoever from prison administrators. I fear that my appeals have been intentionally misplaced or destroyed.

E. REQUEST FOR RELIEF

I believe that I am entitled to the following specific relief:

I'm requesting a federal investigation of the treatment of inmates in light of new California Laws that are stiffer against repeat offenders and its effect on the conduct of Correctional Officers. 2.) I'm requesting punitive damages in the amount of $450,000.00, due to the psychological and physical damages caused to my person. 3.) I'm requesting a formal apology from the warden and staff of the California Correctional Institution.

_____ /s/ Macarthur Rumbles
(Name of person who wrote this Complaint if not plaintiff) (Signature of Plaintiff)

11/30/96
(Date)

(Additional space if needed; identify what paragraph is being continued).

her office and told me "I told you I was gonna get your nigger ass. Now I'm gonna throw your ass into 4B Jail (a high security area). We run this place." Then she spit in my face, wiped it away, and escorted me to the sergeant's office. As a Vietnam Veteran, with a history of PTSD (Post Tramatic Stress Disorder), the constant sight of officers with guns - in high towers - devastated the progress made in my recovery. I suffered from nightmares of her (and other officers) entering my cell in the night to beat me. I also developed a serious case of uncontrollable (nerve) shaking. Her constant use of "nigger ass" this and "nigger ass" that, has produced a serious bout with depression and fear, and feeling of helplessness (black male under the wrath of a white female officer).

(2)

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No. 99-537

In the Supreme Court of the United States

DONALD R. HILL, et al.,
Petitioners,

v.

MACARTHUR RUMBLES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF 36 STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Are prisoners required by 42 U.S.C. 1997e(a), as amended by the Prison Litigation Reform Act, to exhaust administrative remedies before filing suit for damages?

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STATEMENT OF *AMICI* INTEREST

California's petition addresses the continuing viability of one of the States' most important tools for managing their prisons and jails—inmate grievance systems and similar dispute resolution programs. The decision below diminishes the effectiveness of those systems by allowing prisoners to literally make a "federal case" out of every routine dispute with correctional officials, and in the process, deprives the States of the opportunity to resolve inmates' concerns internally—before litigation.

Internal dispute resolution systems serve a vital function in the States' management of their growing prison and jail populations, for those systems provide an inexpensive and effective way for dissatisfied prisoners to point out internal practices that may need improvement. And "[f]or the prison administrator[,] this involves *using* the system beyond its day-to-day effects: periodically reviewing the grievances to identify patterns, to anticipate problems, and to formulate policies and procedures that respond to them." S. Brakel, Administrative Justice In The Penitentiary: A Report on Inmate Grievance Procedures, 1982 Am. Bar Founda. Res. J. 111, 129 (1982) (emphasis in original). Indeed, that vital impetus for self-correction was a primary reason that administrators initially implemented grievance systems. V. McArthur, *Inmate Grievance Mechanisms: A Survey of 209 American Prisons*, 38 Federal Probation 41, 44 (Dec. 1974).

And by encouraging internal self-improvement, those systems resolve a significant number of disputes that would otherwise end up in court. Grievance systems are quite effective in that regard, with empirical studies indicating that a substantial number of inmate complaints lead to

modifications of official policy. *Managers Need Comprehensive Systems for Assessing Effectiveness and Operation of Inmate Grievance Mechanisms*, (General Accounting Office, Oct. 17, 1977) 2-3. Those grievance-prompted changes in turn avert many lawsuits that would otherwise "require defendants and other staff members to put in long hours conferring with counsel, answering interrogatories, giving depositions, preparing for trial, 'managing' the press and testifying at trial. Many non-frivolous suits concern small monetary sums, and the time devoted to them by administrators is disproportionate to the amounts involved." G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute-Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation*, (National Institute of Corrections, U. S. Dept. of Justice 1984) 5-6.

Moreover, the grievance systems cost much less than litigation. Although it costs States an average of between $1,200 and $1,500 to litigate a prisoner's grievance, resolving the same grievance through administrative proceedings costs an average of $166. G. Cole, and J. Gilbert, *Alternate Dispute Resolution Mechanisms for Prisoner Grievances*, 9 Just. Sys. J. 306, 308 n.1, 315 (1984).

Congress understood that when, in 1996, it passed the Prison Litigation Reform Act ("PLRA"), modifying 42 U.S.C. 1997e(a) to mandate exhaustion of administrative remedies before a prisoner sues. The decision below ignores the statute's intent, reimposing the high operational costs that the PLRA was designed to limit. That decision is wrong, and left undisturbed, it and others like it will not only frustrate Congress's efforts to limit inmate suits, but will also exact a costly toll of both time and money from States, which will be forced once more to battle in federal court about issues that

often can be resolved much more efficiently through grievance programs. The States have a vital interest in seeing that the congressional intent embodied in the PLRA is carried out by the courts, and therefore urge the Court to review the judgment below.

REASONS FOR GRANTING THE WRIT

Three compelling reasons point to the need for review of the judgment below: (1) its impact on the day-to-day operation of prisons and jails is so significant; (2) conflicting lower-court decisions on the question presented have created great uncertainty for both State officials and the prisoners they oversee; and (3) the Ninth Circuit erred.

I. The Question Presented Is Critically Important to The Nation's 4,372 Prisons and Jails.

The problems facing our prisons and jails "are complex and intractable . . . requir[ing] expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of" corrections professionals. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). The decision below, and others like it in jurisdictions containing some of the nation's largest prisons and jails, greatly complicates that task.

State and local governments now operate at least 4,372 prisons and jails. Criminal Justice Institute, Inc., *The Corrections Yearbook—1998*, 67 (1999); K. Maguire & A. Pastore, *Sourcebook of Criminal Justice Statistics 1996*. Because inmate grievance systems provide valuable operational data and resolve significant numbers of disputes, all but two States have established some type of inmate grievance system. Broad coverage has long been a key

design principle for such systems, for as a General Accounting Office study recognized more than two decades ago, a grievance system, to be successful, "must be applicable to as broad a range of issues as possible." *Grievance Mechanisms in State Correctional Institutions and Large City Jails* (General Accounting Office, June 17, 1977) at 2.

The decision below produces exactly the opposite result. It holds that prisoners may ignore administrative remedies whenever they seek damages that are not available through grievance systems. That reading of § 1997e(a) creates an exception that effectively abrogates the statute's general rule, because almost all prisoners seek damages, and no State except Louisiana has a grievance system that authorizes damages for anything other than the loss of personal property. Similar precedents control in the Fifth and Tenth Circuits, which together with the Ninth Circuit, contain the largest prison and jail systems in the country. *See Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *The Corrections Yearbook—1998*, 2, 210. If those precedents stand, they will undermine the utility of administrative dispute resolution systems where they are needed most.

And the decision below will surely have palpable effects inside prison walls:

> *[If] a prisoner may circumvent state agencies by bringing a section 1983 action, corrections personnel may not become aware of, and hence may not be able to rectify, administrative deficiencies* until federal litigation is commenced. . . . Rather than have state policymakers determine the

> appropriate reform, the federal judiciary interposes its own judgment.
>
> * * *
>
> *Although this might benefit the individual prisoner bringing the action, problems affecting the entire prison population may remain unresolved.*

S. Russo, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies*, 7 Seton Hall L. Rev. 366, 392 and n.148 (1976) (emphasis added). The PLRA sought to eliminate that problem, but the trend toward the pre-PLRA approach, exemplified by the decision below, could not have come at a worse time, for the States' prison systems are facing ever-more-challenging burdens as their populations continue to grow.

Qualitatively, corrections staff are facing significant new challenges in housing mentally ill prisoners, prompting unprecedented, and still evolving, changes to operating procedures. H. Steadman & B. Veysey, *Providing Services for Jail Inmates with Mental Disorders* (National Institute of Justice, U. S. Dept. of Justice 1997); P. Rubin & S. McCampbell, *The Americans With Disabilities Act and Criminal Justice: Mental Disabilities and Corrections* (National Institute of Justice, U. S. Dept. of Justice 1995); F. Cohen, *Disciplinary Proceedings and Mental Illness*, 4(4) Corrections Managers' Report 3 (American Correctional Association 1998). At the same time, the prison population now includes more elderly inmates and more young offenders, and both groups need special accommodations. S. Sampson, *Project for Older Prisoners*, 1(2) Corrections Managers' Report 11 (1995); E. Loughran, *Statistics*,

Predictions and Reality: How Do We Make Sense of Changing Juvenile Crime? 1(1) Corrections Management Quarterly 67, 70-71 (1997). Last, but by no means least, there has been a "massive expansion of the female inmate population," raising such unique challenges as pregnancy and child care issues, the difficulties inherent in cross-gender supervision, and the need for a distinct custodial atmosphere. M. Fleisher, R. Rison & D. Helman, *Female Inmates: A Growing Constituency in the Federal Bureau of Prisons*, 1(4) Corrections Management Quarterly 28, 29 (1997); M. Morash, T. Bynum & B. Koons, *Women Offenders: Programming Needs and Promising Approaches*, (National Institute of Justice, U. S. Dept. of Justice 1998); C. Stewart, *Management Response to Sexual Misconduct Between Staff and Inmates*, 2(2) Corrections Management Quarterly 81 (1998).

Those qualitative challenges are complicated by significant quantitative changes as well. The nation's prison population increases by more than 1,150 inmates each week, and has grown by 58 percent in this decade. A. Beck & C. Mumola, *Prisoners in 1998* (Bureau of Justice Statistics, U. S. Dept. of Justice 1999) at 1. To cope with the increasing number and changing nature of inmates, correctional agencies have hired large numbers of new employees who must be integrated into their constantly changing operational systems. *The Corrections Yearbook—1998*, 142 (51,841 new hires in 1997).

The combined effect of those changes has been to put new stresses on correctional systems. The States must cope with novel challenges affecting unprecedented numbers of prisoners, and must do so with growing numbers of new staff. Although they conscientiously try to, and usually succeed in, meeting those challenges, shortfalls are inevitable. Grievance systems provide invaluable data about

the nature and potential solutions for the resulting problems. The decision below and the trend it typifies deprive officials of that data. That may benefit individual plaintiffs, but in the end, it hurts far more prisoners.

Further, the approach adopted below increases the burden of litigation. Many matters that would otherwise be resolved internally will go directly to the federal courts. Federalizing those usually trivial disputes requires the diversion of scarce State resources because "during the course of litigation, administrators and other corrections personnel may be called as witnesses or be named as parties to the proceedings. As a consequence, these individuals are diverted from their managerial and supervisory functions. The result is a less efficient institutional operation." S. Russo, *supra*, at 393. *See also* G. Cole, R. Hanson & J. Gilbert, *supra* at 5-6 (emphasis added). Although the number of prisoner suits has declined since the passage of the PLRA, their burden is still substantial and is likely to increase if the gatekeeping function of § 1997e(a) can be sidestepped with a simple demand for damages. L. Meachum, *Judicial Business of the United States Courts: 1988 Report of the Director* (Administrative Office of the United States Courts 1999) 146 (noting that 26,462 prisoner civil rights and prison condition suits were filed in 1998).

In sum, the Ninth Circuit's decision and similar decisions elsewhere will make it harder for corrections officials to deal with day-to-day operational problems. Instead, resolution of those problems will become the business of the federal courts, which "are not equipped by experience or otherwise to 'second guess' the decisions of . . . [prison and jail] administrators." *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 133, 137 (1977) (Burger, C. J., concurring). That hardly "reflects the . . . healthy sense of realism" that recognizes "that needed

reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field—prison administrators themselves." *Id.* Indeed, it flies in the face of this Court's clear direction that "prison administrators . . . and not the courts, are to make the difficult judgments concerning institutional operations." *Turner v. Safley*, 482 U.S. 78, 89 (1987). That far-reaching impact on State and local prison officials, together with the like effect on the courts themselves, shows why this case merits review, even apart from the clear circuit split on the question.

II. Prison Administrators Need Clear Guidance on This Recurring Issue.

The circuit split that California's petition describes is real, and has grown since the petition was filed. *See Wyatt v. Leonard*, _____ F.3d _____ (6th Cir. 1999) (holding that "prisoners must exhaust the prison's grievance procedures before filing suit in federal court even though the damages remedy sought is not an available remedy in the administrative process"). That widening split of authority has created great uncertainty for the nation's prison administrators, as the Second Circuit recently noted: "[t]he law concerning the PLRA's exhaustion requirement is in great flux. Several circuits, as well as district courts in this circuit, are split on . . . whether the administrative exhaustion requirement is inapplicable where the relief requested—i.e., strictly monetary damages—is not 'available' through the administrative process." *Liner v. Goord*, _____ F.3d _____ (2nd Cir. 1999). Frustratingly enough, that split has itself inhibited other courts' resolution of the issue, as evidenced by the fact that the Second Circuit's *Liner* decision cited the split as grounds for avoiding the issue.

Because prisoner suits continue to be filed in great number, and because district courts have reached markedly different conclusions on the issue, *see Langford v. Couch*, 50 F. Supp.2d 544, 546 n.9 (E.D. Va. 1999) (collecting cases), courts and litigants in the seven circuits that have not ruled on the issue lack clear guidance. Indeed, there are conflicting decisions on point within some districts. Compare *Polite v. Barbain*, 1998 U.S. Dist. LEXIS 3600 (S.D.N.Y. 1998) with *Beeson v. Fishkill Correctional Facility*, 28 F. Supp.2d 884 (S.D.N.Y. 1998). Moreover, because the issue has not been resolved in the Second, Third or Fourth Circuits, that pattern will continue for the foreseeable future, absent guidance from this Court.

III. The Ninth Circuit Erred.

Finally, review is warranted because the decision below is at odds with the statute. Congressional intent is of "paramount interest" in any exhaustion inquiry. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Where Congress has mandated exhaustion, its will must be enforced. *Patsy v. Florida Board. of Regents*, 457 U.S. 496, 502 n.4 (1982). There are at least two ways, in addition to those described in the petition, that the Ninth Circuit's decision strays from Congress's intent.

First, the court of appeals misconstrued the meaning of the term "available" in § 1997e(a). The court appears to have adopted the analysis of *Lacey v. C.S.P. Solano Medical Staff*, 990 F. Supp. 1199, 1205 (E.D. Cal. 1997), which held that prisoners have no remedies "available" to them for purposes of § 1997e(a) if they seek damages available in administrative proceedings. *See* Pet. at 10a. In addition to other flaws in the *Lacey* analysis, *see Spence v. Mendoza*, 993 F. Supp. 785, 787-788 (E.D. Cal. 1998), that view fails

to account for the significant changes that prisoners can effect through prison grievance systems even where those grievance systems do not themselves offer damages.

Administrative remedies in the nation's prisons have helped both prison administrators and inmates, in spite of the fact that those remedies almost never include damages. As discussed above, prison grievance systems have led to significant systemic changes benefiting inmates. Further, those remedies resolve a relatively high percentage of individual claims, even though the vast majority of grievance systems do not provide for damages. D. Dillingham and L. Singer, *Complaint Procedures in Prisons and Jails: An Examination of Recent Experience* (National Institute of Corrections, U. S. Dept. of Justice 1980) 34-35, Chart 2 and Table 13. Indeed, the most recent study of New York's grievance system indicated that 36 percent of prisoners' complaints were sustained in whole or in part. *Inmate Grievance Program: Annual Report—1998* (New York Department of Correctional Services 1999) 10.

In contrast, only six percent of prisoner-plaintiffs obtain any relief in court. R. Hansen and H. Dalay, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* (Bureau of Justice Statistics, U. S. Dept. of Justice 1995) at 19, Table 4. Grievance systems can accomplish much for prisoners—and do so at a fraction of the cost of litigation. Congress's judgment that *all* inmate grievances ought to go that route *first* regardless of the particular relief sought is surely a rational one, and should not be obviated by the short-sighted view that remedies are not "available" if they do not provide damages.

Indeed, that principle is well illustrated by the facts of this case. Inmate Rumbles sought three types of relief: (1) an investigation into staff attitudes towards prisoners, (2) an

apology, and (3) $450,000 in punitive damages. Although California's grievance system could not address his decidedly optimistic valuation of his damage claim, it was ideally suited for evaluating the other relief sought. Rumbles's pursuit of administrative relief may well have resolved his claim, and could at least have narrowed the issues.

Second, had Congress intended to limit prisoners' obligation to pursue administrative procedures (as the court of appeals held), it likely would have inserted language like that found in the Antiterrorism and Effective Death Penalty Act (AEDPA), which Congress passed the same week as the PLRA. The AEDPA expressly excuses remedies when "circumstances exist that render [state remedies] ineffective." 28 U.S.C. 2254(b)(1)(A)(ii). No similar language appears in § 1997e, and indeed the PLRA's amendments to that provision eliminated a former reference to "effective" administrative remedies. As the Court said about a similar dichotomy in the wording of other statutes, "Congress could easily have" stuck with the former language, but "it chose instead to enact more restrictive language and we are bound by that restriction." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 99 (1991). The court of appeals' contrary ruling now warrants review.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the writ.

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No. 99-537

In The

Supreme Court of the United States

DONALD R. HILL, et al.,

Petitioners,

vs.

MACARTHUR RUMBLES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT MACARTHUR RUMBLES' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state prisoner whose only cognizable remedy is monetary damages must exhaust internal prison grievance procedures where monetary damages are not available before filing a section 1983 action for monetary damages.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Macarthur Rumbles respectfully requests that this Court deny the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") seeking review of the decision of the Ninth Circuit Court of Appeals.

OPINION BELOW

The decision of the court of appeals is reported at 182 F.3d 1064 (9th Cir. 1999), and is reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at pages 1a-15a.

STATEMENT OF THE CASE

Respondent Macarthur Rumbles is an African American inmate at the California Correctional Institution. In October 1996, K. Black, a white correctional officer, spit on respondent, called him racial epithets, and assaulted or threatened to assault him. Pet. App. 35a-37a. In his pro se complaint, respondent sought money damages, as well as injunctive-type relief in the form of a formal apology from the prison and a federal investigation into unspecified state laws that "are stiffer on repeat offenders and [the laws'] effect on the conduct of Correctional Officers." *Id.*, at 40a. The district court treated respondent's complaint as one for damages only because it was his "only legally or equitable (sic) recognizable remedy." *Id.*, at 24a. Respondent did not appeal the dismissal of his equitable claims. The court found that because California's inmate appeals process does not allow for money

damages, it is not an "available" remedy for purposes of PLRA exhaustion requirements. *Id.*, at 25a. The district court also found that Congress did not intend "to include state tort claims procedures . . . within the meaning of 'administrative remedy' as that phrase is used" in the PLRA. *Id.*, at 27a. Consequently, the court denied petitioners' motion to dismiss as to respondent's damages claims.

Petitioners subsequently filed an interlocutory appeal. The court of appeals found that because respondent's "only cognizable remedy" was a claim for damages, the "district court properly analyzed the action as one seeking only damages." *Id.*, at 7a. Following its prior decision in *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998), the court of appeals held that state prisoners are not required to exhaust administrative remedies under the PLRA if a prisoner's only remedy for his 42 U.S.C. section 1983 claim is an award of money damages and money damages are not available through the prison's administrative grievance process. *Id.*, at 12a. The Ninth Circuit also held that Congress' use of the term "administrative remedies" in 42 U.S.C. section 1997e(a) referred to prison grievance procedures and not state tort claims procedures. *Id.*, at 14a. Accordingly, the court of appeals affirmed the district court's order denying petitioners' motion to dismiss.

REASONS FOR DENYING THE PETITION

Petitioners assert the broad position that 42 U.S.C. § 1997e(a), as amended by the PLRA, requires prisoners

to exhaust administrative remedies before bringing a section 1983 claim for damages. However, upon closer review, it is apparent that the actual issue in the instant case is much more narrow. Properly analyzed, the precise issue petitioners wish to place before this Court is whether a state prisoner whose *only possible remedy for past conduct is monetary damages* must exhaust internal prison grievance procedures before filing a federal civil rights lawsuit where monetary damages are *not available* through the internal prison grievance procedures. Viewed in this light, petitioners' arguments that the court of appeal's holding is contrary to the plain language, legislative evolution, and goals of section 1997e(a), and that there is a pronounced circuit split, are unpersuasive.

The petition also seeks to overturn the court of appeal's holding that state tort claim procedures are not available administrative remedies that a prisoner must exhaust under 42 U.S.C. § 1997e(a) before filing a section 1983 action. This decision was grounded on careful analysis and well-established precedent which petitioners failed to show was intended by Congress to be changed. Accordingly, this issue does not merit review by this Court.

I. The Court of Appeals Decision Was Correct.

The court of appeals agreed with the district court that respondent's only cognizable remedy for the past incident of excessive force was money damages. The court held that because the California Department of Correction's ("CDC") inmate appeals process does not allow for money damage awards, respondent was not

required to exhaust that process as it did not provide an available remedy. This conclusion is entirely consistent with the plain language of section 1997e(a). As amended, section 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] . . . by a prisoner . . . until such administrative *remedies* as are *available* are exhausted." 42 U.S.C. § 1997e(a), emphasis added. The ordinary meaning of the term "available" is "obtainable, present or ready for immediate use." *Black's Law Dictionary* 135 (6th ed. 1990). The term "remedy" is defined as "the means by which . . . the violation of a right is . . . redressed or compensated." *Black's*, at 1294. Thus, if there is no possible redress or compensation, the process or "means" do not constitute a "remedy." Had Congress intended "administrative remedies" to mean administrative procedures or processes, regardless of the existence of a remedy available through that process, it would have included the term procedures or processes in the language of the statute; the statute would have expressly required prisoners to "exhaust all administrative procedures as are available." Clearly, Congress chose the words that it did, not by accident, but in furtherance of its goal of procedural efficiency in enacting the PLRA. By its plain language, the PLRA requires that prisoners exhaust only those procedures through which the relief sought for the violation of their rights is accessible, obtainable, or ready for immediate use.

Petitioners assert that "[t]here is nothing in the language [of section 1997e(a)] to support the lower court's view that exhaustion is mandatory only when administrative programs dispense monetary awards or grant

relief precisely congruent with the prisoner's desires." This characterization of the court of appeal's holding is incorrect. The court's holding was not based solely on the prisoner's wishes. Rather, it followed precedent where, as here, the only possible remedy for "past conduct" was money damages. Money damages, of course, were not "available." Contrary to petitioners' assertion above, the language of section 1997e(a) – the term "remedy" and the phrase "as are available" – clearly supports this conclusion.

Petitioners point to the PLRA's removal of former section 1997e(a)'s requirement that available administrative remedies be "plain, speedy, and effective" as indicative of Congress' desire to curb courts' examination of the effectiveness of administrative remedies. In this regard they cite the Seventh and Eleventh Circuit decisions which they argue create a split justifying certiorari. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 536 (7th Cir. 1999) ("when these words left the statute so did any warrant to inquire whether exhaustion would be *availing*," emphasis added. "Avail," as used here, is defined as "advantage toward attainment of a goal or purpose: USE," *Merriam Websters Collegiate Dictionary*, 79 (10th ed. 1997); *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998) (removal of the words "indicates that Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is 'available' in the prison involved"). The Ninth Circuit does not disagree with these courts, that "availing" and "effective" do not mean "available," and Congress now wants courts to look at the latter only.

Whether an administrative remedy is "effective" (or "plain" and "speedy" for that matter) focuses on the extent or degree to which an existing remedy redresses or compensates for the violation of a right. By contrast, an administrative remedy is "available" if it simply *exists*, regardless of its adequacy or effectiveness. It is crucial that the PLRA left undisturbed the requirement that administrative remedies be "available."

Petitioners also contend that the Ninth Circuit's interpretation of "available remedies" is inconsistent with the congressional intent behind the PLRA. Petitioners cite legislative history which states that Congress intended to abrogate that portion of *McCarthy v. Madigan*, 503 U.S. 140 (1992), which held that an inmate need not exhaust available administrative remedies before bringing a *Bivens* action for monetary damages. Petitioners state that "[u]nopposed statements made during congressional floor debates reveal that § 1997e was amended in direct response to the Court's holding in *McCarthy* and reflect a purpose to require prisoners to exhaust all available administrative *procedures* before initiating federal claims damages." Petition, at 8, emphasis added. However, petitioners' use of the words "remedies" and "procedures" interchangeably is a sloppy approach where their main argument is the plain meaning of the statute. Clearly the words are not interchangeable and nothing in the legislative history suggests otherwise.

The Ninth Circuit also held that California Tort Claims Act procedures are not "available administrative remedies" that a prisoner must exhaust under section 1997e(a). The court of appeal's found that Congress did not intend to change the well-established principle that

exhaustion of state tort remedies is not required before bringing a section 1983 action. Petitioners' contention that this finding was "perfunctory and unsupported" is not correct. The court explicitly based its conclusion on well-settled precedent, including United States Supreme Court precedent, as well as an analysis of the language of the PLRA, the pre-PLRA version of section 1997e, and their legislative history. Petitioners' only support against this weight of authority and careful analysis is one quote from the PLRA's legislative history. It was petitioners' burden on appeal to show Congressional intent to change this well-established rule. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). Their having failed to meet that burden placed no mandate upon the appellate court to reiterate a detailed explanation of all the precedent that remained unchanged.

In summary, the Ninth Circuit's decision was based upon well reasoned precedent, and the plain meaning of the statute. Therefore, this Court need not review that decision.

II. There Is No Direct Conflict Among The Circuits.

Without analyzing the relevant circuit court cases, petitioners and *amicus curiae* argue that there is a split of authority. However, a closer examination of these decisions reveals that there is no direct conflict among the circuits over the precise issues presented in this case.

The Ninth, Fifth, and Tenth Circuits have held that prisoners bringing section 1983 or *Bivens* claims for injuries due to past, not ongoing, conduct need not exhaust administrative remedies when their only possible relief is

monetary damages and no administrative procedures exist which afford such relief. *Rumbles v. Hill*, 182 F.3d 1064, 1068-69 (9th Cir. 1999); *Whitley v. Hunt*, 158 F.3d 882, 886-87 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997). In each case, the court found that plaintiff sought, and his only possible remedy for past violations was money damages. In the Seventh, Eleventh, and Sixth Circuit cases, which petitioners maintain create the alleged split of authority, the holdings in these cases are based on facts critically different from those before the Ninth Circuit. *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Lavista v. Beeler*, 1999 WL 970372 (6th Cir. Oct. 26, 1999).

In *Perez*, the plaintiff sought damages for ongoing inadequate medical care. *Perez*, at 534. Plaintiff asked only for damages, but the court held that he was required to exhaust the administrative process even though it did not provide for damages. *Id.*, at 537-38. The *Perez* court premised this holding on the fact that because the plaintiff suffered from ongoing medical problems and his treatment remained deficient at the time of the litigation, the state could, and should provide him with some "remedy" other than damages. *Id.*, at 538. Notably, that court expressly distinguished its holding from the Ninth Circuit's in *Lunsford*, and stated, "[i]t is possible to imagine cases in which the harm is done and no further administrative action could supply any 'remedy.' " *Id.* The court explained:

> Suppose the prisoner breaks his leg and claims delay in setting the bone is cruel and unusual punishment. If the injury has healed by the time

> suit begins, nothing other than damages could be a "remedy," and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.

Id. Thus, the *Perez* court dealt with a situation quite different from that in *Rumbles, Whitley,* and *Garrett,* and limited its holding accordingly.

The plaintiff in *Alexander* brought a claim against prison officials claiming that their continuing enforcement of federal legislation restricting prisoners' access to magazines which are sexually explicit or feature nudity was violating his First Amendment rights. *Alexander,* at 1322. He sought an injunction, declaratory relief, and monetary damages. *Id.,* at 1322-23. The Eleventh Circuit held that the plaintiff must exhaust his mixed claim for monetary and injunctive relief through the prison grievance program before filing suit in federal court. *Id.,* at 1328. The court based this conclusion on several grounds. First, the court contrasted *Alexander,* where the plaintiff sought both monetary and injunctive relief, with *Garrett* and similar cases which involved claims for only monetary relief. *Id.,* at 1327. Second, the court reasoned that because the violation at issue was ongoing, the plaintiff may succeed in having the facility halt the infringing practice. *Id.* Finally, because the plaintiff was challenging the constitutionality of a regulation, the court stated that the correctional institution could create a record explaining its justifications for the regulation and its enforcement. *Id.,* at 1327-28. None of these points are applicable in *Rumbles, Whitley* and *Garrett.*

In *Lavista,* the plaintiff was a blind and wheelchair-bound inmate who brought a *Bivens* action alleging

denial of medical care, sexual harassment and sexual assault, destruction of personal property and retaliation while he was incarcerated. *Lavista*, at *1. Plaintiff sought, and needed, injunctive relief in addition to monetary damages. *Id.* The Sixth Circuit held that the plaintiff must exhaust his administrative remedies before filing a federal suit, even if the damages were not available through the administrative process. *Lavista*, at *2-3. Again, as in *Alexander*, the court of appeals necessarily limited its holding to mixed claims for injunctive and monetary relief. *Id.* The court elaborated that with such a mixed claim the plaintiff might obtain administrative review of policies and procedures concerning disabled prisoners; that there could be an "attempt to correct legitimate complaints, even though it will not pay damages." *Id.*, at *3.

The common thread running through these Seventh, Eleventh, and Sixth Circuit cases is that because the plaintiffs in those cases either complained of ongoing conduct and/or could obtain and use injunctive or declaratory relief, there was something that the administrative grievance process could do for them. Some of these opinions fail to discuss the difference between an "effective" or "adequate" remedy and an "available" one, or they improperly analyze section 1997e(a) as requiring exhaustion of available administrative remedy programs rather than specific available administrative remedies. However, they all ultimately conclude that it was rational to require exhaustion within the language of the statute because there were administrative remedies that were available and which provided relief, even if these remedies were not the inmate's preferred form of relief.

Respondent submits that the Ninth Circuit does not quarrel with this view; it simply was faced with a different factual scenario.

The plaintiffs in the Ninth, Fifth, and Tenth Circuit cases not only exclusively sought monetary damages, in each case a money damage award was the only form of relief which could provide a remedy for their injury. Simply put, there was nothing else the prison grievance process could do for them. Because their only possible remedy was not available, these circuits properly held that exhaustion was not required by the statute. There is no substantial point of conflict between the circuits because each circuit's holding and rationale were based on significant factual differences. Although the holdings in district courts will surely differ depending on whether the facts in each case indicate that the internal prison grievance process can provide a remedy, these courts do not lack guidance as *amicus curiae* asserts.

Finally, there is absolutely no dispute among the circuits that state tort claim procedures are not available administrative remedies that a prisoner must exhaust under section 1997e(a) before filing a section 1983 action, and petitioner does not contend otherwise. As mentioned above, this rule is supported by well-established precedent and does not warrant this Court's review.

CONCLUSION

In this case, respondent's only cognizable remedy for injuries he suffered from a past incident of excessive force

was monetary damages. Because the prison's administrative grievance procedures do not provide monetary damages, there is simply no way for the prison to redress the violation of respondent's constitutional rights. The court of appeals concluded that exhaustion is not required by section 1997e(a) because there are no "available" administrative remedies. This situation differs from one where a prisoner complains of ongoing conduct and/or could obtain injunctive or declaratory relief. Requiring exhaustion in spite of the plain language of the statute, even though it would be futile, would burden both the prisoner and the correctional institution. For these reasons, the Petition for a Writ of Certiorari must be denied.

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No. 99-537

IN THE SUPREME COURT OF THE UNITED STATES

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

No. 99-537

D. HILL, K. BLACK, T. MEADORS, and J. BECKETT, *Petitioners*,

v.

MACARTHUR RUMBLES, *Respondent*.

PETITIONERS' REPLY BRIEF

Respondent's argument that there is no "direct" conflict among the circuits mischaracterizes the holdings of the opposing circuit opinions and ignores several important appellate decisions announced after the petition was filed. These rulings exacerbate the disagreement among the circuits, and confirm that the conflict is direct even under respondent's view of what constitutes such a conflict. In light of these decisions, respondent cannot deny that there is an irreconcilable split among the appellate courts concerning § 1997e's exhaustion requirement to inmate claims for damages. Furthermore, respondent has not denied the importance and substantiality of the questions presented. The need for plenary review is acute.

ARGUMENT

According to respondent, the circuit conflict is not direct because those appellate courts that have held that § 1997e requires prisoners to exhaust claims for damages have done so only where damages were not the sole cognizable remedy and "there was something that the administrative grievance process could do for [the inmates]." Opp. at 10, citing *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999); *Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Lavista v. Beeler*, No. 97-6295, 1999 WL 970372 (6th Cir. Oct. 26, 1999). Respondent argues that, in contrast, those appellate courts that have excused prisoners from having to exhaust claims for damages have done so only where the inmates sought damages exclusively and "there was nothing else the prison grievance process could do for them." Opp. at 11, citing *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (Appendix 1a); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997).

Respondent's portrayal of the split as turning on whether there was anything the prison grievance process could do for the inmate fails to withstand scrutiny. As illustrated by this case, if respondent had filed a grievance his allegations of officer abuse, supervisory inadequacy, and wrongful promulgation of policy could have been investigated, and corrective measures could have been taken. Appendix 35a-39a. Nothing in California's regulations pertaining to inmate grievances suggests that respondent's allegations would have been disallowed or ignored. *See* Cal. Code Regs. tit. 15, §§ 3084-3085. And this is true regardless of the extent to which respondent's complaint was deemed by the judiciary to contain a cognizable claim for money damages only.

In attempting to explain away the conflict, respondent not only concocts a faulty distinction between the opposing appellate opinions, he ignores important recent decisions that confirm the irreconcilability of the circuit split.

In *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999), a state prisoner brought a claim solely for damages based on allegations that prison employees had been deliberately indifferent to his safety and had provided him with inadequate health care. In direct conflict with the court of appeals' decision in this case, the Sixth Circuit ruled that "prisoners must exhaust the prison's grievance procedures before filing suit in federal court even though the damages remedy sought is not an available remedy in the administrative process." *Id.* at 878. Thus, even under respondent's criteria, the ruling directly conflicts with the lower court's approach in this case because it requires exhaustion where the inmate sought damages exclusively and the allegations were such that "there was nothing else the prison grievance process could do for [the inmate]." Opp. at 11.

This holding was reaffirmed in *Freeman v. Francis*, No. 98-4288, 1999 WL 973623 (6th Cir. Oct. 27, 1999), which erased any remaining doubt about the irreconcilability of the conflict. In *Freeman*, the Sixth Circuit reiterated that § 1997e requires state prisoners to exhaust prison grievance processes even when they seek "solely monetary damages." *Id.* at *1.

> As we explained [in *Wyatt*], although it may make sense to excuse exhaustion of the prisoner's complaint where the prison system has a flat rule declining jurisdiction over such cases, it does not make sense to excuse the failure to

> exhaust when the prison system will hear the case and attempt to correct legitimate complaints, even though it will not pay damages.

Id. Because California's inmate grievance system is analytically indistinguishable from the one in *Freeman*, the Sixth Circuit's position cannot be reconciled with the court of appeals' decision in this case.

Since the petition was filed, the Seventh and Eleventh Circuits also permanently fixed their opposition to the Ninth Circuit's approach. In *Harris v. Garner*, the Eleventh Circuit concluded that "we reaffirm that the term 'available' as used in section 1997e(a) . . . means that a prisoner must exhaust all administrative remedies that are available before filing suit, regardless of their adequacy." 190 F.3d 1279, 1286 (11th Cir. 1999). In *Masssey v. Helman*, the Seventh Circuit concurred with this stance:

> As we have already concluded, whether the administrative process actually produces a result that satisfies the inmate is not the appropriate inquiry. Instead, courts merely need to ask whether the institution has an internal grievance procedure by which prisoners can lodge complaints about prison conditions. If such an administrative process is in place, then sec. 1997e(a) requires inmates to exhaust those procedures before bringing a prison conditions claim under 42 U.S.C. sec. 1983.

No. 99-1459, 1999 WL 989388, at *6 (7th Cir. Nov. 2, 1999).

These decisions confirm that the circuit conflict concerning the applicability of § 1997e's exhaustion requirement to inmate claims for damages is direct and intractable even under respondent's view of what constitutes such a conflict. Accordingly, and because the importance and substantiality of the questions presented have not been denied, the need for plenary review is pronounced and immediate.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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